RECENT DECISIONS.

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AGENCY—KNOWLEDGE OF AGENT—NOTICE TO PRINCIPAL.—The president of a trust company, who was also the director of a bank, induced certain of his co-directors to execute a note, on condition that it would not be discounted until signed by all. He had the note discounted by the trust company without the additional signatures. *Held,* the trust company could recover, only such knowledge being imputed as the principal would have acquired acting personally. *Lanning* v. *Johnson* (N. J. 1908) 69 Atl. 490.

Notice to an agent acting within the scope of his authority is notice to the principal. This rule is based upon two theories; (a) the legal identity of principal and agent; (b) the duty of the agent to disclose pertinent facts, and the presumption that he will perform that duty. On the first theory, only such knowledge is imputable as the agent acquires during the actual negotiation, and the adverse interest of the agent does not prevent the imputation; *Bank of U. S.* v. *Davis* (N. Y. 1842) 2 Hill 451; while under the second, which is supported by the weight of authority, it is immaterial when the agent acquires the information, provided it may be presumed to be present in his mind at the time of the transaction; *Fairfield Savings Bank* v. *Chase* (1881) 72 Me. 226; but if the agent's interest is adverse, his knowledge may not be imputed. Mechem, Agency, §721, *Innerarity* v. *Merchants' National Bank* (1885) 139 Mass. 332. The rule applied in the principal case is not logically developed from either theory. Although grounded upon the first, the result reached is contrary to that which normally flows therefrom, since the adverse interest would be there immaterial, and while in its origin (*Sooy v. State* (1879) 41 N. J. 394) it expressly repudiates the underlying reason of the second, it here reaches a result which accords with the cases based upon that reason.

ATTACHMENT—EQUITABLE PROTECTION.—A, an attachment creditor, sought to set aside as fraudulent an assignment made to B by C, the defendant, in the attachment suit. *Held,* (two judges dissenting), equity could not grant relief. *Hart* v. *Clark & Co.* (1908) 111 N. Y. Supp. 888.

One who has levied under an attachment acquires a lien and is more than a creditor at large. *Kittredge* v. *Warren* (1844) 14 N. H. 509; Drake, Attachment §§224, 425; *contra, Ex parte Foster* (1842) 2 Story 131. Though the question is mooted, Pomeroy, Eq. Juris. §1415, the better view requires equity to set aside a fraudulent conveyance in aid of the attachment lien. *Boswick* v. *Blake* (1893) 45 Ill. 85; *Hahn* v. *Salmon* (1884) 20 Fed. 801; *Hunt* v. *Field* (N. J. 1852) 1 Stock. 36; *contra, Temment* v. *Battey* (1877) 18 Kan. 324. The New York courts, after irreconcilable decisions, cf. *Bates* v. *Plonsky* (1882) 28 Hun 112; *Falconer* v. *Freeman* (1847) 4 Sandf. 565; *Bowe* v. *Arnold* (1883) 31 Hun 256, have rejected this doctrine. *Whitney* v. *Davis* (1896) 148 N. Y. 256. The argument that an attachment creditor should be denied relief because equity will aid only a judgment creditor with an execution returned unsatisfied, *Griffin* v. *Nitcher* (1869) 57 Me. 270; *Martin* v. *Michael* (1856) 23 Mo. 50, rests upon a misconception. The rule is merely an application of the fundamental doctrine that equity protects a creditor only after lien is acquired and after the party has exhausted his adequate remedies at law. *Case of Bauregard* (1879) 101 U. S. 688; *Robert* v. *Hodges* (1863) 16 N. J. Eq. 29; Bump, Fraudulent Conveyances §535. Since the attachment creditor, in the principal case, has fulfilled both requisites the distinction is unsupportable. Due to the uncertainty of an attachment creditor's claim some courts deny him equitable protection. *Meux* v. *Anthony* (1850) 11 Ark. 411. Though much may be said in support of this proposition still, it is suggested, the legislative intention in giving the writ of attachment, i. e., to help creditors against fraudulent conveyances, *People* v. *Cameron* (1845)

7 Ill. 468, and the fact that an undertaking must be given are ample refutation. *Martz* v. *Pfeer* (1883) 80 Ky. 600. The decision in the principal case seems regrettable.

ATTORNEY AND CLIENT—LIEN OF DEFENDANT'S ATTORNEY IN NEW YORK.—The defendant's attorney successfully defended to judgment her claim to certain property and then sought to enforce a lien on the property protected. *Held,* (two judges dissenting) under Code Civ. Proc. §66, giving a lien on the client's "cause of action, claim or counterclaim," a defendant's attorney has no lien. *In re Robinson* (1908) 109 N. Y. Supp. 827.

In New York at common law the attorney's compensation was a matter of statutory regulation, and the lien upon judgment, whether of the plaintiff or defendant's attorney, was confined to the taxable costs. Jones, Liens, Vol. I, 153-157, 184. Code Civ. Proc. (1848) §258, making the attorney's compensation a matter of agreement, did not affect the lien further than to enlarge the extent of its attachment. *Ward* v. *Syme* (1852) 9 How. Prac. 16. Code Civ. Proc. (1876) §66 (A'md 1879) further protected the attorney with a lien from the inception of the "action, claim or counterclaim" but not for an answer mitigating damages, *Pierson* v. *Safford* (1883) 30 Hun 521, or merely establishing a defense without asserting an affirmative cause of action. *Lewis* v. *Burke* (1889) 51 Hun 71; *Longyear* v. *Carter* (1895) 88 Hun 513; *White* v. *Summer* (1897) 16 App. Div. 70. But where the attorney seeks to enforce his lien after securing judgment, §66 is inapplicable, and the lien by virtue of the common law exists upon the judgment recovered irrespective of whether he represent plaintiff or defendant. *In re Bailey* (1884) 31 Hun 608; *In re Lazelle* (N. Y. 1896) 16 Misc. 515; *Albro* v. *Bevins* (1895) 86 Hun 590. Accordingly in the principal case, since it was attempted to enforce the lien after judgment, a different result might well have been reached.

BANKRUPTCY—INSANITY OF BANKRUPT.—After the filing of an involuntary petition the alleged bankrupt was adjudicated insane by a state court and declared to have been so for three years. *Held,* the bankruptcy court had jurisdiction, but the defense of insanity was competent for the jury. *In re Ward* (1908) 161 Fed. 755.

It has always been held that a lunatic has not the mental capacity to commit an act of bankruptcy. *In re Weitzel* (1876) 7 Biss. 289. If the lunatic was sane when the alleged acts of bankruptcy were committed, but adjudged insane before the petition was brought, there was doubt as to the jurisdiction to adjudicate him a bankrupt. *Anonymous* (1807) 13 Ves. Jr. 590 (giving bankruptcy jurisdiction); *Ex parte Cahen* (1879) 10 Ch. Div. 183 (no jurisdiction for voluntary petition); *In re Farnham* (1895) 2 Ch. Div. 799 (doubting jurisdiction); *In re Weitzel, supra; In re Pratt* (1872) 2 Low. 96 (both allowing jurisdiction). But the Bankruptcy Act of 1898 §8, as construed, denies the jurisdiction of a court of bankruptcy of the affairs of a lunatic. *In re Funk* (1900) 4 Am. Bank. Rep. 96; See 2 COLUMBIA LAW REVIEW 556. Once jurisdiction has attached, however, insanity will not bar the proceedings, nor is there now the former difficulty in granting a discharge. *In re Miller* (1904) 13 Am. Bank. Rep. 345; cf. *In re Pratt, supra.* But, after the petition is filed, a judicial declaration of lunacy may prevent an adjudication of the bankruptcy by shifting the burden of proof as to sanity to the creditors, *In re Kehler* (1908) 19 Am. Bank. Rep. 513, and raising an issue of sanity for the jury. The principal case is sound.

CONFLICT OF LAWS—CONCURRENT JURISDICTION—BOUNDARY RIVERS.—A resident of the state of Washington was convicted in Oregon for using a purse net in the Columbia river on the Washington side of the thread which forms the boundary between the two states. The laws of Washington did not make such use illegal. *Held,* where jurisdiction is concurrent, of two conflicting laws, the law of that state which is most restrictive must prevail. *State* v. *Nielson* (Or. 1908) 95 Pac. 720.

To obviate the difficulty of enforcing state laws, Washington and Oregon were given concurrent jurisdiction over the Columbia river. *Sanders* v. *Anchor Line* (1888) 97 Mo. 26; Rorer, Interstate Law 337. This gives each state the power to enforce its own laws over the entire river. *Annie M. Smull* (1872) 2 Sawyer 226; *State* v. *Metcalf* (1896) 65 Mo. App. 681; *Keator Lumber Co.* v. *Boom Corp.* (1888) 72 Wis. 62. Under this definition an act is punishable by either one of two conflicting laws, but this is not fatal, under the principles of international law, *Regina* v. *Anderson* (1868) 11 Cox C. C. 198, which it is submitted, should be applied. The only cases in which the question of conflicting laws has been squarely passed upon, have, however, declared that each state can only enforce such laws as are acquiesced in by the other. *In re Mattson* (1895) 69 Fed. 535; *Ex parte Desjeiro* (1907) 152 Fed. 1004; *President* etc. v. *Bridge Co.* (1860) 13 N. J. Eq. 46. The latter case is to be distinguished on its facts, and the federal cases proceed on doctrines of expediency. Under this view, however, the legislative freedom of each state is curtailed, whereas the object of such jurisdiction was to give the fullest effect to state sovereignty. Note 65 L. R. A. 963. Under neither view is the principal case sound. To obviate all the practical difficulties inherent in either theory, laws common to both should be secured by treaty.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—LOCAL POLICY.—The plaintiff, a citizen of Mississippi, obtained in Missouri a judgment against the defendant, also a citizen of Mississippi, on a gambling contract entered into in the latter state, and prohibited by its laws. *Held*, the judgment was enforcible in Mississippi. *Fauntleroy* v. *Lum* (1908) 28 Sup. Ct. Rep. 641. See NOTES, p. 569.

CONSTITUTIONAL LAW—JURY—WAIVER OF RIGHT TO TRIAL BY TWELVE JURORS IN CRIMINAL CASES.—The defendant's trial for a misdemeanor had progressed at some length when it became necessary to excuse one of the jurors. The defendant and the prosecuting attorney stipulated in writing that the trial should continue with the same force as if the juror had not been discharged. Later a like agreement was made on the discharge of a second juror. *Held*, the verdict of conviction was invalid, as the accused had no power to waive his constitutional right to a trial by twelve jurors. *Dickinson* v. *United States* (1908) 159 Fed. 801. See NOTES, p. 577.

CORPORATIONS—PROMOTERS—FUTURE STOCKHOLDERS—REMEDIES.—The defendant and another organized the plaintiff corporation and, while they held exclusive control, increased its stock from forty shares to one hundred and fifty thousand. For one hundred and thirty thousand of these the corporation bought property in which the defendant was interested. The remaining twenty thousand shares were sold to the public. *Held*, the corporation could not rescind the sale or recover the profits made by the defendant. *Old Dominion Copper etc. Co.* v. *Lewisohn* (1908) 28 Sup. Ct. Rep. 634. See NOTES, p. 567.

CRIMINAL LAW—CONVICTION—EFFECT OF SUSPENDED SENTENCE.—The defendant, having voted while under suspended sentence for burglary, was charged with violation of a statute disfranchising persons "convicted of a felony." *Held*, a verdict of guilty, without sentence, was not a conviction within the meaning of the statute. *People* v. *Fabian* (1908) 40 N. Y. L. Jour., Oct. 6th.

Ordinarily, "conviction," as distinguished from "sentence" or "judgment," signifies the finding of guilt by verdict of a jury. *Com.* v. *Richards* (Mass. 1835) 17 Pick. 295. And in this sense it has frequently been construed when required by justice, or warranted by public understanding. Thus, the plea of *autrefois convict* is a bar to an indictment, although no judgment was rendered. 4 Bl. Comm. 336. And, where a constitution confers the pardoning power upon the executive "after conviction," a par-

don granted after a verdict, but before sentence is valid. *Com.* v. *Lockwood* (1872) 109 Mass. 323. Similarly, a reward, offered for information leading to "conviction," is earned upon return of a verdict of guilty. *Williams* v. *U. S.* (1876) 12 Ct. Cl. 192; *contra, Burgess* v. *Boetefeur* (1844) 49 E. C. L. 481. On the other hand, in cases where "conviction" is made the ground of some disability, incompetency or special penalty, it has been properly held to mean verdict followed by judgment, *Com.* v. *Miller* (1897) 6 Pa. Super. Ct. 35, since no conviction is technically complete until sentence is passed and recorded. *County* v. *Cumberland* (1860) 36 Pa. 349, 353. Accordingly, a judgment has been held essential to corrupt blood by attainder, [2 Inst. 391a]; to disqualify a witness, [*Lee v. Gansel* (1774) Cowp. 1, 3], a voter, [*State* v. *Houston* (1889) 103 N. C. 383; *contra (semble), U. S.* v. *Watkins* (1881) 6 Fed. Rep. 152], or a legislator, [*Case of Falmouth,* Cush., Mass. Elect. Rep. 203]: to deprive an adulteress of dower, [*Schiffer* v. *Pruden* (1876) 64 N. Y. 47], and to avoid the license of a person convicted of evading liquor laws. [*Com.* v. *Kiley* (1889) 150 Mass. 325; *contra, Quintard* v. *Knoedler* (1885) 53 Conn. 485]. The principal case, coming within the second category of decisions, is clearly sound.

DOMESTIC RELATIONS—DIVORCE—CONDITIONAL DECREE.—A wife was granted an absolute divorce, the decree being suspended, however, until the payment of costs. She remarried before the costs were paid. *Held,* her remarriage was valid. *Confer's Estate* (Pa. 1908) Leg. Int., Sept. 4th.

In jurisdictions which hold the entry an essential part of the judgment, this second marriage is illegal as the parties in the original suit were never divorced. *Clark* v. *Cassidy* (1880) 64 Ga. 662; *State* v. *Eaton* (1893) 85 Wis. 587. The better view seems to be that judgment is such upon rendition when the judicial nature of the act terminates, the subsequent entry by the clerk being merely a ministerial act; *Hall v. Tuttle* (N. Y. 1843) 6 Hill 38; *Cook's Estate* (1888) 77 Cal. 220; and the entry is but evidence of the judgment. *Van Orman* v. *Phelps* (N. Y. 1850) 9 Barb. 500; *Newman's Lessee* v. *Cincinnati* (1850) 18 Oh. 323; *Ansley* v. *Carlos* (1846) 9 Ala. 973. Under this view the second marriage was legal since a court may not suspend the operation of such a decree, for when a judgment is rendered its effect shall not hinge on an ability to pay costs. See *Mickle* v. *State* (Ala. 1896) 21 So. 66. Nor would policy dictate that the validity of a decree secured by the wife should depend on the dereliction of the husband.

DOMESTIC RELATIONS—MARRIED INFANTS—ALIENATION.—A secret marriage between infants above the age of consent was followed by malicious alienation of the husband's affection, by his parents. *Held,* the wife, suing by a guardian *ad litem,* may recover. *Cochran* v. *Cochran* (1908) 111 N. Y. Supp. 588.

Although there was at common law some conflict as to a wife's right to sue for alienation, *Duffies* v. *Duffies* (1890) 76 Wis. 374; *Bennett* v. *Bennett* (1889) 116 N. Y. 584, modern statutes have generally given her that right. *Bennett* v. *Bennett, supra; Mehrhoff* v. *Mehrhoff* (1886) 26 Fed. 13. A marriage between infants capable of consenting is valid regardless of parental assent; *Parton* v. *Hervey* (Mass. 1884) 1 Gray 119; *Holtz* v. *Dick* (1884) 42 Oh. St. 23; and although anyone may in good faith harbor a wife who has left her husband, *Hartpence* v. *Rogers* (1898) 143 Mo. 623; *Oakman* v. *Belden* (1900) 94 Me. 280, officious intermeddling with the relation, by a stranger is *prima facie* actionable. *Hartpence* v. *Rogers, supra; Trumbull* v. *Trumbull* (1904) 71 Neb. 186. However, parents may in good faith give advice, and the presumption is that they so act. *Hutcheson* v. *Peck* (N. Y. 1809) 5 Johns. 196; *Payne* v. *Williams* (Tenn. 1875) 4 Baxt. 583; *Trumbull* v. *Trumbull, supra.* But although marriage emancipates infants from parental control, the two relations being inconsistent, *Bennett* v. *Smith* (N. Y. 1856) 21 Barb. 439; *State* v. *Lowell* (1899) 78 Minn. 166, it does not emancipate them at law: they cannot make binding contracts, *Taunton* v. *Plymouth* (1818) 15 Mass. 203; *Sanford* v. *McLean* (N. Y.

1832) 3 Paige 117, and suit must be by guardian *ad litem*. *O'Hara* v. *McConnell* (1876) 93 U. S. 150; *Heirs* v. *Atl. Coast Line Ry. Co.* (1906) 75 S. C. 311. The alienation in the principal case having been malicious, and suit brought by guardian *ad litem*, the wife was correctly allowed a recovery.

EQUITY—MONOPOLY—RELIEF OF HUMAN SUFFERING.—The defendant contracted to assist the plaintiff, and for ten years not otherwise to practice painless dentistry in Philadelphia where few were expert in its methods. Bill to restrain breach. *Held*, although the common law remedy is inadequate, equity will refuse a decree to prevent plaintiff's securing a monopoly in the scientific means of relieving human suffering. *Thomas* v. *Borden* (Pa. 1908.) Leg. Int., July 31st.

Equity refuses to act where injustice would be done third parties, *Riesz's Appeal* (1873) 73 Pa. 485; *Curran* v. *Water Power Co.* (1874) 116 Mass. 90, or where the public interest would be prejudiced. *Conger* v. *R. R.* (1890) 120 N. Y. 29. However, such contracts as in the principal case, equity does not regard as against public policy since every other person is at liberty to practice in the town, *Davis* v. *Mason* (1793) 5 T. R. 118, and the defendant can be as useful to the public in another place. *Butler* v. *Burleson* (1844) 16 Vt. 176; *Gordon* v. *Mansfield* (1900) 84 Mo. App. 367; *Foss* v. *Roby* (1907) 195 Mass. 292. Nor would the creation of a monopoly seem material, since the injunction would have issued had the plaintiff's process been a trade secret. *Simmons Medical Co.* v. *Simmons* (1897) 81 Fed. 163 (secret process of making a medicine); note 58 C. C. A. 8. Assuming the contract not to be in restraint of trade, no case appears to deny relief because the subject of the contract is the practice of a profession. *McClurg's Appeal* (1868) 58 Pa. St. 51; *Ryan* v. *Hamilton* (1903) 205 Ill. 191. Accordingly, the principal case appears an unwarranted extension of equitable principles.

EQUITY—VENDEE'S LIEN.—The vendor having failed to make a good title, the vendee of real property brought suit to recover the purchase money paid and to have it declared a lien upon the land. *Held*, the plaintiff was entitled to the relief sought. *Elterman* v. *Hyman* (N. Y. 1908) 84 N. E. 937.

The vendee of real property brought suit to rescind the contract on the ground of fraud and to have the purchase money paid declared a lien upon the land. *Held* (three judges dissenting), the plaintiff was entitled to a rescission and the return of the money, but not to a lien, *Davis* v. *Rosenzweig Realty Operating Co.* (N. Y. 1908) 84 N. E. 943. See NOTES, p. 571.

EVIDENCE—PROFERT OF CHILD TO PROVE RESEMBLANCE.—In a suit for seduction, the three months old child of the seduced woman was exhibited to the jury to show its resemblance to the defendant. *Held*, no error. *Anderson* v. *Aupperlee* (Ore. 1908) 95 Pac. 330.

Obviously the resemblance of the child to the putative father is relevant when relationship is at issue, *State* v. *Saidell* (1899) 70 N. H. 174; *Gaunt* v. *State* (1880) 50 N. J. L. 490, but many courts refuse to allow profert of the child on the ground of the uncertainty of the evidence. *State* v. *Neel* (1901) 23 Utah 541; *Clark* v. *Bradstreet* (1888) 80 Me. 454. It would seem that the admissibility of the evidence would depend on whether or not it is of sufficient probative value, and this in turn would depend on the maturity of the child. *Shorten* v. *Judd* (1895) 56 Kan. 43. Some courts have endeavored to lay down an arbitrary rule as to the age under which a child cannot be exhibited, *State* v. *Harvey* (1900) 112 Ia. 416, while others leave the question of sufficient maturity to the discretion of the trial court. *State* v. *Danforth* (1905) 73 N. H. 215. Since the decision of a trial judge as to the existence of facts necessary to the admission of evidence is generally regarded as final, Wigmore, Evid., sec. 16; cf. *Vaughan* v. *State* (1894) 58 Ark. 353, the latter view, followed in the principal case, seems correct.

EVIDENCE—PROVING DANGEROUS TENDENCY BY SHOWING PRIOR ACCIDENT.—The plaintiff was injured in a passage way running through an elevator shaft. Evidence of a prior accident at the same place was sought to be introduced. It seems that no proof of the recency of that accident or of substantial similarity of conditions was offered. *Held,* (two justices dissenting), that although the defendant did not know of the prior accident, testimony thereof was competent. *Cefola* v. *Siegel-Cooper Co.* (1908) 111 N. Y. Supp. 1112. See NOTES, p. 579.

EVIDENCE—TELEPHONE CONVERSATIONS—PROOF OF IDENTITY.—A witness testified to "calling up" a telephone number and asking for the manager. Some one answered whose voice he did not recognize but who spoke intelligently regarding a past transaction. *Held,* the evidence was admissible. *Barrett* v. *Magner* (Minn. 1908) 117 N. W. 249.

Where the admissibility of a telephone conversation depends merely on proof that the witness has been in communication with a particular office, the presumption that the telephone company has done its duty, renders the evidence admissible. *Wolfe* v. *Mo. Pac. Ry.* (1888) 97 Mo. 473; *Reed* v. *R. R.* (1887) 72 Ia. 166; *contra, Cotton Oil Co.* v. *Western Union Tel. Co.* (1906) 126 Ga. 621. Where, however, it is necessary to establish the identity of a particular individual this presumption should be reinforced by proof of identity other than that the person answering assumed to be such individual, *Kimbark* v. *Ill. Car Co.* (1902) 103 Ill. App. 632; *Murphy* v. *Jack* (1894) 142 N. Y. 215; *contra, Guest* v. *R. R.* (1898) 77 Mo. App. 258, and obviously where the witness is himself "called up", since the presumption is useless, other proof of identity is essential. *Vaughn* v. *State* (1900) 130 Ala. 18. In the case of letters, where comparison of hand writing is impossible, proof that their contents show familiarity with the affairs of the alleged writer, is sufficient to admit. *Deep River Bank's Appeal* (1900) 73 Conn. 341; *Singleton* v. *Bremer* (S. C. 1824) Harp. 133. Similarily, knowledge of past transactions should identify a speaker sufficiently to make the evidence admissible, especially since the jury may still find as to the identity on the weight of the evidence. *Wolfe* v. *R. R., supra.* The reasoning of the principal case may therefore be supported.

HIGHWAYS—STREET RAILWAYS.—An electric street railway company laid its tracks upon the highway, the fee of which was in the plaintiff. *Held,* since such a use was an additional burden, the railway must give compensation. *Duncan* v. *Nassau Electric R. Co.* (1908) 111 N. Y. Supp. 210. See NOTES, p. 575.

INSURANCE—SUICIDE—INSANITY.—An insurance policy contained a clause rendering it void if insured should commit suicide, whether sane or insane. *Held,* insured might recover if at the time of the act he did not know its probable result. *Modern Woodmen* v. *Neeley* (Ky. 1908) 111 S. W. 282.

If a suicide understands the physical consequences of his act but not its moral complexion, the suicide clause of a policy is inoperative. *Manhattan Life Ins. Co.* v. *Broughton* (1883) 109 U. S. 121. Such policy, however, must be distinguished from those which contain insanity clauses, as in the principal case. *Bigelow* v. *Ins. Co.* (1876) 93 U. S. 284. All courts agree that the insertion of the insanity clause eliminates an understanding of the moral complexion as a test. Granting that the insured was ignorant of the morality of his act, if he was unconscious of its physical nature and consequences, some courts deem the act as legally an accident, *Pierce* v. *Ins. Co.* (1874) 34 Wis. 389; *Masonic Life Ass'n* v. *Pollard* (1905) 121 Ky. 349, and hold the insurer, *Manhattan Ins. Co.* v. *Beard* (1902) 112 Ky. 455, thus giving but limited effect to the specially inserted insanity clause. But many cases deny recovery if death was caused by any physical act of the deceased. *Clarke* v. *Assurance Soc.* (1902) 55 C. C. A. 200; *Moore* v. *Ins. Co.* (1906) 192 Mass. 468; *Keefer* v. *Modern Woodmen* (1902) 203 Pa. 129. This view would better effectuate the intention of the parties and re-

lieve the courts of the need of distinguishing the degrees of insanity. *Billings* v. *Accident Insurance Co.* (1891) 64 Vt. 78. Both classes of holdings claim to follow *Bigelow* v. *Ins. Co., supra,* but in that case the court expressly limited its decision to its facts. Although the authorities are divided, the decision in the principal case is to be regretted.

INTERSTATE COMMERCE—CRIMINAL INTENT UNDER THE STATUTE.—A statute declared a misdemeanor a carrier's wilful failure to file and publish rates or to adhere strictly thereto, and a shipper's securing transportation by any device, at a concession. A shipper unwittingly paid too little. *Held,* for the defendant, the intent not being material. *The Standard Oil Co. of Ind.* v. *United States* (1908) No. 1409 C. C. A. (7th Circuit).

Although wilfulness has always been an element in the carrier's offense, 24 U. S. St. 379 §10, a shipper was originally liable only if he knowingly employed a device to accomplish a fraud, e. g. false weighing; 25 U. S. St. 857 §10; and although the legislature in its latest enactment has, after debate, 36 Cong. Rec. Pt. 2, p. 2152-4, retained "wilful" as an element of the carrier's offense, it has struck out knowing fraud as a limitation of "any device" employed by the shipper to secure a concession. 32 U. S. St. 847. The apparent intent of Congress was to put the carrier and shipper on an equal footing, and to make knowledge essential. But, the only pertinent decisions of the Supreme Court, *New Haven R. R.* v. *Int. C. C.* (1906) 200 U. S. 361; *Armour Packing Co.* v. *U. S.* (1908) 209 U. S. 56, have construed the act strictly, negativing wilfulness as applied to the carrier, and, in their somewhat conflicting *dicta,* have indicated a similar construction of "device," as opposed to the principal case. Such an interpretation accords with the strict construction usually given where the forbidden acts involve no moral turpitude and are followed by no degrading punishment. *United States* v. *Leathers* (1879) 6 Sawy. 17; *State* v. *Rogers* (1901) 95 Me. 94; *State* v. *Ryan* (1899) 70 N. H. 196.

LABOR UNIONS—LEGALITY OF STRIKE—UNION RULES.—The rule of a federation of labor unions provided that all labor disputes should be settled through the executive council acting for the employees. The employers instituted an "open shop," announcing that they would settle disputes only with the employees involved and not with their organization. The employers sued to enjoin the resulting strike. The employees were not under actual contracts. *Held.* (Knowlton, C. J., dissenting), the rules making the council arbiter and allowing of possible future illegal strikes were illegal. *Reynolds* v. *Davis* (Mass. 1908) 84 N. E. 457.

The decision does not clearly indicate which of the two grounds mentioned is the basis of the reasoning. The principal case is undoubtedly sound if its objection is to arbitration, for this would amount to an unjustifiable interference with the employers' business. But the court more clearly holds the strike illegal because, under the rules the council may inaugurate sympathetic strikes to support an individual grievance. The dissent objects because these rules are made the basis of the decision. Under the Massachusetts labor decisions a labor union may strike to support its rules provided their purpose is not illegal. *Com.* v. *Hunt* (Mass. 1842) 4 Metc. 111, 129; *Carew* v. *Rutherford* (1870) 106 Mass. 1, 10. If the rules do not provide for arbitration but demand only the union's right to decide the course to be pursued by the employee, their purpose involves but little more than the well settled right to organize. It is to be noted that the present strike is not illegal as a sympathetic strike under the test of "trade dispute" in *Picket* v. *Walsh* (1906) 192 Mass. 572. The fact that these rules might lead to strikes in support of individual grievances should not render them unlawful, since all such strikes will not under this test be illegal as sympathetic strikes, e. g., a strike supporting a competent workman who refuses to accept a wage reduction; and the mere apprehension thereof should not warrant the issuing of an injunction. *Aberthaw Constr. Co.* v. *Cameron* (1907) 194 Mass. 208, 215; *Reynolds* v. *Everett* (1894) 144 N. Y. 189.

LITERARY PROPERTY—DRAMATIC COMPOSITION—RIGHTS IN A DANCE.—The plaintiff, owner of an exclusive right to produce an unpublished opera, "The Merry Widow," sought an injunction to restrain the defendant from imitating the waltz in the production. *Held,* the plaintiff had no literary property in the dance, the performers having the rights, if any. *Savage* v. *Hoffman* (1908) 159 Fed. 584.

The common law right of the author in an unpublished manuscript of a dramatic composition to be protected from invasion is well settled. Drone, Copyright, 104, 554; Macgillivray, Law of Copyright, 122. A composition is dramatic which repeats or mimics some action, speech, emotion, passion or character, real or imaginary; *Fuller* v. *Bemis* (1892) 50 Fed. 925, 929; any piece which, on being presented would produce the emotions which are the purpose of regular drama. *Russell* v. *Smith* (1848) 12 Q. B. 217. It has been held that situations, scenic effects, [*Chatterton* v. *Cave* (1875) 33 L. T. N. S. 256], pantomime, [*Lee* v. *Simpson* (1847) 3 C. B. 871], motion and gestures, *Daly* v. *Palmer* (1868) 6 Blatchf. 256, are as much the subject of protection as words. Stage directions for representing narration wholly by action are a dramatic composition. Id., 264. Stage directions for a ballet are a dramatic composition. Drone, Copyright, 588. Assuming that the dance in the principal case is the result of stage directions in the original libretto, since it is an integral part of the dramatic action, it is, as a dramatic composition, a subject for protection, and the plaintiff, owner of the libretto, may assert his right. On the assumption that the dance was not provided for in the original libretto, but was invented by the present performers and proper stage directions then interpolated, it would become the property of the plaintiff by the principle of literary accession. *Keene* v. *Wheatley* (1861) 14 Fed. Cas. 7644. Assuming that such stage directions were never so inserted, it is questionable whether the plaintiff or performers could assert any right, owing to the lack of evidence. *Keene* v. *Wheatley, supra; Abernethy* v. *Hutchinson* (1825) 3 L. J. Ch. 209. If in the latter assumption the question of evidence were waived, it would then appear that the right would belong to the plaintiff from the relation of master and servant. *Keene* v. *Wheatley, supra.* Except possibly on the assumption that there was never any written evidence of the dance, the decision in the principal case appears open to criticism.

MASTER AND SERVANT—TORTS OF THE SERVANT'S HELPER.—In assisting the defendant's driver, a bystander negligently injured the plaintiff. *Held,* defendant was liable since the helper was merely an instrumentality used by the driver in his master's business. *Hollidge* v. *Duncan* (Mass. 1908) 85 N. E. 186.

To hold the defendant it is not necessary that the stranger be regarded as a servant, *James* v. *Muelebach* (1899) 34 Mo. App. 512, nor that the driver in the principal case should have implied authority to engage him, *Booth* v. *Mister* (1835) 7 C. & P. 66, but only that the helper be under the servant's control so as to be in effect a mere instrumentality in the work. *Althorf* v. *Wolfe* (1860) 22 N. Y. 355; *Spencer* v. *State* (1906) 110 App. Div. 585. Shearman and Redfield (Negligence, 4th Ed., 157) attack this doctrine theoretically, arguing that since a principal is not bound by the contracts of a sub-agent employed by the agent without authority, he should not be liable for the sub-agent's tort, and Smith J. in *Jewell* v. *Grand Trunk Ry.* (1874) 55 N. H. 85, insists that to impute the torts of a helper to a master through his servant would violate the rule of proximate cause. But these arguments fail to recognize that the helper is not an independent agent but merely the servant's tool and that his negligence is legally that of the servant, *Simons* v. *Monier* (1859) 29 Barb. 419; *Althorf* v. *Wolfe, supra,* just as a homicide through an innocent agency is the crime of the principal. Wharton, Criminal Law (10th Ed.) §207.

MUNICIPAL CORPORATIONS—CONTRACTS—PAYMENT FROM A SPECIAL FUND.—A city council, authorized by a special election to issue bonds for a lighting plant, engaged the plaintiffs to draw plans. Later the council, without good cause, resubmitted the question to the people and the measure was defeated.

Warrants were issued to the plaintiffs payable out of the general funds, though the city's debt limit had been reached. *Held,* the warrants were valid. *Simons* v. *City of Eugene* (1908) 159 Fed. 307.

When a special fund is authorized for a public improvement a warrant can be drawn on and is payable only from such fund. *Potter* v. *Whatcom* (1901) 25 Wash. 207. But though the contractor has agreed to look to the special fund, it is held that an ordinance creates a duty to raise the fund authorized thereby and neglect to do so will render the city liable *ex delicto. Commercial Bank* v. *Portland* (1893) 24 Or. 188. The principal case is rested on this theory. But it seems that the plaintiffs might have recovered on the contract. Impossibility of performance created by a subsequent act of law operates as a discharge, *Macon etc. R. R.* v. *Gibson* (1890) 85 Ga. 1, but such a law will be unconstitutional unless the right to enact it was expressly reserved. A municipal ordinance is a "law" within this rule. *Iron etc. Ry.* v. *Memphis* (1899) 96 Fed. 113, and an ordinance conditioned upon the approval of the citizens by vote should be similarly regarded. See *Gelpcke* v. *Dubuque* (1863) 1 Wall. 175; *Meyer* v. *Muscatine* (1863) 1 Wall. 385; *Clarke* v. *Rochester* (1864) 28 N. Y. 605 at 635. But there was no reservation of a right to redetermine the question, and it is submitted, therefore, that the acts resulting in the withdrawal of the authority to issue bonds were unconstitutional as to contracts already entered into. Recovery on the contract has even been allowed where the promise to issue bonds was *ultra vires* when made. *Hitchcock* v. *Galveston* (1877) 96 U. S. 341; *State Board* v. *Ry.* (1874) 47 Ind. 407, but the reasoning in these cases, emphasizing receipt of benefits by the defendant, suggests that the real ground is quasi-contractual.

PARTNERSHIP—MARRIED WOMAN'S ACTS—MARRIED WOMAN AS PARTNER.—Action at law brought against a married woman to collect money due from a firm of which she was alleged to have been a member. *Held,* that as the defendant contributed none of her separate estate to the firm's capital, she could not have been a partner. *Morreau* v. *Gas Fixture Co.* (Wash. 1908) 161 Fed. 381.

The right of a married woman to engage in a partnership under modern statutes is much disputed. She has been allowed freely to enter such a contract, *Abbott* v. *Jackson* (1884) 43 Ark. 212, so long as her husband is not interested in the firm, *Plummer* v. *Lord* (Mass. 1862) 5 Allen 460, and has been entirely refused such a right, because the enabling statute forbade a contract by a married woman to answer for the liability of another. *Vannerson* v. *Cheatham* (1894) 41 S. C. 327. Some jurisdictions give her a qualified right on condition that her husband consents to such a use of her separate property. *Penn* v. *Whitehead* (Va. 1867) 17 Gratt. 503. Husband and wife may not become partners under such acts. *Board of Trade* v. *Hayden* (1892) 4 Wash. 263; *contra, Baker* v. *Banking Co.* (1894) 105 Ala. 514. To allow this relation between them violates the purpose of the legislation by again vesting the husband with control, which the statutes deprive him of. By making it possible for the parties to sue one another, the rules of evidence as to their private relations would be disregarded. *Lord* v. *Parker* (Mass. 1861) 3 Allen 127. Reason and authority favor this rule, except in case of a materially altered statute. In New York the law is extremely doubtful in view of the conflicting decisions. Cf. *Zimmerman* v. *Erhard* (1879) 8 Daly 311, affirmed 83 N. Y. 74; *Hendricks* v. *Isaacs* (1889) 117 N. Y. 411; *Suau* v. *Caffe* (1890) 122 N. Y. 208. As the wife in the principal case had not invested separate property, and the husband was the one actually engaged in business, in law he should be regarded as the partner. *Swasey* v. *Antram* (1873) 24 Oh. St. 87.

PERSONAL PROPERTY—WILLS—RULE IN SHELLEY'S CASE.—Personalty was bequeathed in trust for the support of A for life, and after A's death all to be held discharged of the aforesaid trust for the use of the heirs and assigns of A forever. *Held,* the Rule in Shelley's Case did not apply, and therefore the corpus passed to the heirs and assigns. *Jones* v. *Reeves* (Del. 1908) 69 Atl. 785. See NOTES, p. 573.

PLEADING AND PRACTICE—APPEAL—JOINT AND SEVERAL JUDGMENTS.—An executor sued for the construction of a will joining six next of kin as parties defendant. Four appealed from an adverse judgment which was reversed for all the next of kin. On motion to amend the remittitur. *Held*, (three judges dissenting), the judgment was several and did not inure to the benefit of the next of kin not appealing. *St. Johns* v. *The Andrews Institute* (N. Y. 1908) 85 N. E. 143.

The rights of parties not joining in an appeal depend, at common law, upon the nature of the judgment. A joint judgment, reversed as to one co-defendant, must be reversed as to all. *Altman* v. *Hofeller* (1897) 152 N. Y. 498. See 4 COLUMBIA LAW REVIEW 141. If a judgment, though joint in form, be several in fact and law, *Hanrick* v. *Patrick* (1886) 119 U. S. 156 at 163, a party having such several interest may appeal without joining co-parties, or the appellate tribunal may reverse or modify the judgment without affecting the parties not before it. *Geraud v. Stagg* (1855) 10 How. Pr. 369. There is no authority for the dissenting judge's proposition that the next of kin are united in interest as a "class." They are tenants in common, and their rights of action are separate and independent. *Hyde* v. *Stone* (1828) 9 Cow. 230; *Fairchild* v. *Edson* (1897) 154 N. Y. 199. A judgment for construction of a will is conclusive as to all parties joined and those in privity with them. *Lowe* v. *Holder* (1899) 106 Ga. 879. But there is no such privity between next of kin that one will be bound or benefited by a judgment rendered in an action conducted by another in which he was not made a party or represented. *Purdy* v. *Doyle* (1829) 1 Paige 558. The two next of kin were not represented on appeal by the executor; he could not appeal, not being a "party aggrieved." *Bryant* v. *Thompson* (1891) 128 N. Y. 426. Had the judgment below been in favor of the next of kin that judgment could have been reversed only as to such as were made parties to the appeal. *McCammon* v. *Worrall* (1844) 11 Paige Ch. 99. Parties who fail to appeal are deemed to acquiesce in the judgment below. *Todd* v. *Daniel* (1842) 16 Pet. 521. The principal case is sound. Similar inconsistent judgments are of record. See *Anderson* v. *Anderson* (1889) 112 N. Y. 104.

PLEADING AND PRACTICE—COUNTERCLAIM—EXISTING CAUSES OF ACTION.—To an action on a note defendant counterclaimed breach of plaintiff's contract not to sue for a fixed time. *Held*, a valid counterclaim, despite a statute allowing only the counterclaim of causes of action existing when the (principal) action was begun. *Hall* v. *Parsons* (Minn. 1908) 117 N. W. 280.

A contract never to sue operates as a release and may be pleaded in bar to avoid circuity of action, *Millett* v. *Hayford* (1853) 1 Wis. 401, but an agreement not to sue for a fixed time will not be a bar; *Gibson* v. *Gibson* (1818) 15 Mass. 106; *Guard* v. *Whiteside* (1851) 13 Ill. 7; *Chandler* v. *Herrick* (N. Y. 1821) 19 John. 129; but see *Clopper's Adm'rs* v. *Union Bank of Maryland* (Md. 1826) 7 Harris and J. 92, *contra;* since the rule that a right of action once suspended by act of the party is wholly lost, prevents the temporary suspension of the cause. *Winans* v. *Houston* (1831) 6 Wend. 471; *Guard* v. *Whiteside, supra.* Such agreement should be admitted as a counterclaim, for the statutes allowing counterclaims aim to avoid circuity of action, and the provisions limiting them to causes existing when the plaintiff's suit began were merely directed against surprising the plaintiff by new or purchased claims. *Shannon* v. *Wilson* (1862) 19 Ind. 112; *Clarke* v. *Magruder* (Md. 1807) 2 Harris and J. 67. The counterclaim in the principal case is within the letter of the statute for since by bringing suit plaintiff broke his contract, defendant's claim accrued concurrently and therefore existed when (though not before) the action was begun. But see *contra* the parallel case of *Newkirk* v. *Nield* (1862) 19 Ind. 194. Though some authorities hold that "damages caused by the institution of a suit cannot be counterclaimed therein," 25 Am. and Eng. Encyc. 575 (2nd Ed.); *Arkansas City Bank* v. *Hasil* (1897) 57 Hun 754; *Kansas,*

etc. Co. v. *Hutton* (1892) 48 Kan. 166; but see *Reed* v. *Chubb Bros.* (1859) 9 Ia. 178, *contra,* the policy of the statute and the rule of liberal construction of code sections seem to support the principal case.

PUBLIC SERVICE COMPANIES—DISCRIMINATION IN FACILITIES—PRIVATE CARS.—A carrier distributed its cars *pro rata,* making no deduction for cars upon its lines, owned by individual shippers. *Held,* such a method was an unlawful discrimination in favor of private car owners. *U. S. ex rel. Pitcairn Coal Co.* v. *B. & O. R.R. Co.* (1908) 4th Circuit, No. 773.

A carrier must furnish facilities adequate to meet ordinary needs, *Pittsburg etc. R.R. Co.* v. *Morton* (1878) 61 Md. 539, but if unable, must make a *pro rata* distribution of such as it has. *Riddle Dean & Co.* v. *N. Y. etc. R.R. Co.* (1888) 1 I. C. C. R. 504. When a shipper adds private cars to the railway's equipment, he is held to have submitted them to any reasonable rules which the carrier must enact to fulfil his obligation. *Logan Coal Co.* v. *Penn. R.R. Co.* (1907) 154 Fed. 497. And a shipper cannot receive benefits by supplying himself with those facilities which the carrier should itself furnish. *State ex rel.* v. *C. N. O. etc. Ry. Co.* (1890) 47 Oh. St. 130. The principal case is sound since by failing to deduct for cars owned by an individual shipper the carrier would be giving him a benefit at the expense of others. *Rice* v. *R.R.* (1888) 1 I. C. C. R. 503, 547-9; *R.R. Comm.* v. *Hocking Valley Ry. Co.* (1907) 12 I. C. C. R. 398. That the private cars be furnished other shippers, if the carrier's own facilities be inadequate, is a logical extension of the rule in the principal case, though opposed to a dictum in *R.R. Comm.* v. *Hocking, supra.* Such an extension would accord more with a sound public policy and is the only rule consistent with Section 1 of the Act to Regulate Commerce providing that "cars shall be furnished irrespective of ownership."

QUASI CONTRACTS—DEBTS OF A THIRD PARTY—PAYMENT UNDER COMPULSION.—A tax was assessed against the defendant's interest as mortgagee in certain land. Later, the mortgage having been paid off, the plaintiff bought the land and paid the tax in order to remove the lien. *Held,* plaintiff could not recover such payment from the defendant in the absence of contract. *William Ede Co.* v. *Heywood* (Cal. 1908) 96 Pac. 81.

Where money is paid to avoid illegal judicial process directed against personal property, the payment is, in the main, regarded as involuntary, since the property is generally liable to immediate seizure. *Preston* v. *City of Boston* (Mass. 1831) 12 Pick. 7. In the case of real property the courts have been more unwilling to grant relief, since the plaintiff could generally have protected his property by attacking the illegal process, 7 COLUMBIA LAW REVIEW 601; *Fleetwood* v. *City of New York* (N. Y. 1849) 2 Sandf. 475. To render all such payments involuntary the danger to the property must be so immediate that payment is the only adequate protection. *Brumagin* v. *Tillinghast* (1861) 18 Cal. 265; *Lamborn* v. *Co. Commissioners* (1877) 97 U. S. 181. Where, however, the plaintiff pays to a third person an obligation owed by the defendant, in order to protect his property from a legal claim against it, there need be no immediate danger or actual duress to entitle him to recover, since the very existence of such valid claim is sufficient compulsion to render the payment involuntary, *Brown* v. *Hodgson* (1811) 4 Taunt. 189; *Van Santen* v. *Standard Oil Co.* (1880) 81 N. Y. 171, and the law compels the defendant, for whose benefit the money was involuntarily paid, to refund it, irrespective of any express agreement between the parties. *Treat* v. *Craig* (1901) 135 Cal. 91; *Dana* v. *Colby* (1884) 63 N. H. 169. The principal case cannot be supported.

REAL PROPERTY—LATERAL SUPPORT—HIGHWAYS.—A municipal corporation asked an injunction against one who was endangering the highway by excavating deeply in abutting land. *Held,* injunction would issue since regardless of who owns the fee of the highway, the abutter owes it lateral support even though the pressure be increased by improvements. *Village of Haverstraw v. Eckerson* (N. Y. 1908) 84 N. E. 578.

Adjoining owners owe support to land in its natural state but not to superincumbent weight. *Farrand v. Marshall* (N. Y. 1853) 19 Barb. 380. Between private owners the rule has been applied strictly; *Pullan v. Stallman* (1903) 70 N. J. L. 10; and where the public owns the fee of the highway, it would seem that the same rule would apply but for considerations of public policy which appeared to justify an extension of the rule. Cf. *Bond* v. *Smith* (N. Y. 1887) 44 Hun 219. But where the fee is in the abutter, the principal case might be supported on the ground that a dedication to highway purposes includes the right to use all appropriate appliances for the enjoyment of that right; 8 COLUMBIA LAW REVIEW 575, and if one grants such right of passage he may not use his land so as to inconvenience or obstruct the enjoyment of the right granted. *Underwood v. Carney* (Mass. 1848) 1 Cush. 285; *Washburn, Easements* (4th Ed.) 291. No well considered authority has been found directly bearing on the principal case.

TRUSTS—DEVISE IN EVASION OF STATUTE—SECRET TRUSTS.—Under a statute avoiding devises to charity made within thirty days of the testator's death, land was devised to a catholic church, provided that, on the testator's death within thirty days, it should go to "Most Rev. P. J. Ryan, Archbishop of Philadelphia, absolutely." The latter knew nothing of the devise. *Held,* he was entitled absolutely. *Flood* v. *Ryan* (Pa. 1908) 69 Atl. 908.

The case, in its facts, goes beyond *Schultz's Appeal* (1875) 80 Pa. 396, and *Hodnett's Estate* (1893) 154 Pa. 485, the authorities relied on to support it. But the result is sound though the opinions reflect a confusion of equitable principles with considerations of public policy. Courts of Equity have enforced a resulting trust where the devisee, though innocent of any fraud, has silently acquiesced in the devise as on trust. *O'Hara* v. *Dudley* (1884) 95 N. Y. 403. But a knowledge of the testator's intent, communicated in his lifetime, is indispensable. *Wallgrave* v. *Tebbs* (1855) 2 Kay & J. 313. Both of these principles were invoked in *Fairchild* v. *Edson* (1897) 154 N. Y. 199 at 220, where one of three legatees taking under the same clause was declared a trustee. In the principal case the testator's purpose to evade the statute was conceded and the devisee intended to comply therewith. On similar facts in *Gore* v. *Clarke* (1892) 37 S. C. 537, a gift was declared void as a fraud upon the law. Public policy in certain cases may demand a broad construction of statutes, as in conveyances in fraud of transfer tax laws. *Matter of Cornell* (1901) 66 App. Div. 162, 169. But where an abridgment of the *jus disponendi* and the defeasance of an absolute devise are involved, the courts should await legislative action rather than extend the application of a statute under the guise of equitable principles.